Supreme Court, U.S.
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No. 07 -

In The

Supreme Court of the United States

Tod N. Rockefeller
Petitioner,
v.
Jeff Bingaman in his official capacity as U.S. Senator, NM; the U.S. Senate; Steve Pearce in his official capacity as U.S. Representative, NM; and the U.S. House of Representatives,
Respondents.

On Appeal to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI

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END

Questions Presented

1. Whether a party that has suffered injury from the operation of a statute has standing to challenge the constitutionality of said statute ?

2. Whether the Legislative Branch [and/or members] is the proper party defendant for a complaint challenging the constitutionality of legislation ?

Parties Proceeding

Petitioner was plaintiff (06-0198 JB) in the New Mexico district court, and subsequently Appellant to the U.S. CoA for the Tenth Circuit.

All of the Legislative Branch respondents are represented by Thomas Cabellero, Esq..

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Table of Authorities

CONSTITUTIONAL PROVISIONS

U.S. Const., Amend. V

U.S. Const., Amend. VII

STATUTES

28 U.S.C. §§§ 1253, 1254 (1), 2284;

CASES

Clinton v. City of New York, 524 U.S. 417 (1998);
Ex Parte Poresky, 290 U.S. 30, 31 (1933);
Flast v. Cohen, 392 U.S. 83, 91n.4 (1968);
Gonzales v. Automatic Employees Credit Union, 419 U.S. 90, 97-98 (1974);
Gravel v. United States, 408 U.S. 606, 618 (1972);
Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 715 (1962);
Kennedy v. Mendoza-Martinez, 372 U.S. 144, 154 (1963);
Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992);
Newdow v. U.S. Congress, No. 00-16423, Sec. II (9th Cir. Feb. 28th, 2003);
Powell v. McCormack, 395 U.S. 486, 503-06 (1961);
Pulliam v. Allen, 466 U.S. 552, 537, 541 (1984);
Swift & Co. v. Wickham, 382 U.S. 111, 127 (1965);
Wyoming v. United States, 279 F.3d 1214, 1225 (10h Cir. 2002);
Zemel v. Rusk, 381 U.S. 1, 5 (1965).

Rules

Supreme Court ("Sup.Ct.") Rules 10(a), 10(c), 14.1

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1). The Tenth Cir. denied Petitioner's Petition for Rehearing En Banc (06-2332) with an Order filed on JULY 16, 2007. See also detailed Jurisdictional Statement *infra*.

Constitutional Provisions at Issue

Fifth Amendment Right of Due Process of Law
Seventh Amendment Right of Trial by Jury

Statement of the Case

This case is a very simple and straight-forward constitutional challenge to alleged unconstitutional laws [Pub. L. 100-32 amending 28 U.S.C. § 1254, and Pub. L. 94-381 amending 28 U.S.C. § 2284]. Petitioner had thoroughly detailed injuries that he has suffered and would be likely to continue to suffer as a direct result of the operation of the said statutes. See doc. 1 at 5, 6. E.g.: Petitioner had been robbed of a fair jury trial on half a dozen occasions by egregious violations of due process of law in federal courts. See A-19, A-20 *infra*. Petitioner had requested injunctive relief that would have resulted in fair remedial actions towards his injuries.

The three necessary elements of standing had been affirmatively outlined and met by Petitioner as follows: 1) actual concrete and particularized harms were suffered; 2) the injuries suffered were caused by the challenged actions of the defendants; and 3) a favorable decision would redress the injuries. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). **Since the factual injuries suffered by Petitioner could not successfully be attacked, Respondents addressed injuries that they fabricated that were not part of the Complaint [06-0198 JB].** In dismissing 06-0198, the district court repeated the fabricated injuries noted by Respondents. The district court had ignored Petitioner's specific factual identification of the fraud-upon-the-court by Respondents. See A-24, A-25 *infra*. In addition, Respondents claimed two inapposite immunities towards the case. The district court repeated the unsound immunities, and in effect, ruled that an injured party can not challenge legislation alleged to have caused such injury. Said court had very clearly abused its discretion, while also exceeding

its authority by eliminating the requirements of law [28 U.SC. § 2284] which will be discussed further *infra.*

Jurisdictional Statement

Prior to the filing of this instant Petition, it was thought by Petitioner that he should be able to file a direct appeal with this Court because of the requirements that he had me as detailed *infra.* In addition, Petitioner had filed a Notice of Appeal as required by Rule 18 of this Court. See A-32. However, after speaking with and explaining details of the case to Mr. Jeff Atkins, this Court's Case Analyst Supervisor, I was told that an appeal would not be docketed if I attempted to file the case as such.

Since Respondents had failed to dispute the "Injuries in Fact Suffered by Plaintiff " [A-19, A-20 *infra*], such facts became jurisdictional facts that, along with other factors, required the convening of a three-judge court. This Court has ruled the following concerning 28 U.S.C. § 2284:

> "Congress established the three-judge court apparatus for one reason: to save state and federal statutes from improvident doom, on constitutional grounds, at the hands of a single federal district judge. But some of the literal words of the statutory apparatus bear little or no relation to that underlying policy."

See *Gonzales v. Automatic Employees Credit Union,* 419 U.S. 90, 97-98 (1974); see also *Zemel v. Rusk,* 381 U.S. 1, 5 (1965); *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 154 (1963).

This Court has also ruled that, in addition to seeking injunctive relief towards legislation, "the constitutional question presented be substantial" to require "the convening of a three-judge court." See *Flast v. Cohen,* 392 U.S. 83, 91n.4 (1968); see

also *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 (1962); *Ex Parte Poresky*, 290 U.S. 30, 31 (1933). The "constitutional question" that Petitioner presents is one of the most "substantial" of such in the entire history of the United States ("U.S.") : Has the Constitution of the U.S. become an unenforceable law ? Additionally, the "three-judge procedure" was intended to eliminate "the worrisome possibilities that economic or political predilections will find their way into a judgment." See *Swift & Co. v. Wickham*, 382 U.S. 111, 127 (1965). Both lower courts have left no doubt that "political predilections" have most certainly found "their way into [their] judgment[s]." See *Id.*

Despite the fact that Petitioner had met all of the requirements for a three-judge district court to be convened, the district court refused to do so. Said court eliminated the requirements of law within § 2284 thereby exceeding its authority. The 10th Cir. should have advised the district court that it had "erroneously invaded the province of a three-judge court" as Petitioner had requested. See *Idlewild*, 370 U.S. at 716. Rather, the 10th Cir. created an adjudicative dichotomy. Said court claimed that legislation could <u>not</u> be judicially reviewed because the Legislative Branch enjoyed "sovereign immunity". See A-4. Within the <u>same order</u>, the 10th Cir. stated that:

> ". . . our holding in this case does not mean that "[t]he Speech or Debate Clause . . . preclude[s] judicial review of enacted legislation to determine said legislation's constitutionality." Aplt. Opening Br. At 3."

See A-8.

The 10th Cir. admits that legislation can be judicially reviewed, but for no legitimate reason, Petitioner could not obtain such. It had been very affirmatively demonstrated by Petitioner, to both

lower courts, that he had satisfied all of the requirements to [illegible]uire the convening of a three-judge court. E.g., irreparable injuries had been suffered as a direct result of the operation of the challenged statutes. See A-19, A-20; 2) injunctive relief was being requested; and 3) the constitutional question presented is undoubtedly very, very substantial. In excess of their authority, the 10th Cir. eliminated the requirements of 28 U.S.C. § 2284. Petitioner must emphasize again that he is presenting one of the most substantial constitutional questions in the history of the U.S.: Has the Constitution of the U.S. become an unenforceable law ?

Consequently, this Court must hear this case on its merits as if it was being presented as a direct appeal under 28 U.S.C. § 1253, rather than as a Petition for Writ of Certiorari under § 1254. Could some consider that this Court, being made aware of these facts *supra*, was also exceeding its authority by effectively eliminating the requirements of law if no corrective action is taken ?

Argument

Question 1.

Both lower courts have erroneously ruled that a party whom has indeed suffered irreparable harm from a statute[s], requests injunctive relief, and alleges an extremely substantial claim of unconstitutionality has NO standing to challenge such in court. This is a very grave issue that should not be taken lightly by this Court. Both lower courts have effectively ruled that justice and the protections that are supposed to exist within a democracy do not exist within the United States. All facts and applicable law presented by Petitioner have been consistently and completely ignored by said courts in the most intensive demonstration of

bias and ill-will towards him that is possible.

As clearly demonstrated by Petitioner to both lower courts, within each and every one of his pleadings, he has indeed suffered injury related to the challenged statutes. *Cf.* Petitioner's 10th Cir. [06-2332] Opening Brief at 1through 3:

> **"1. Statement of the Case.**
>
> a. Appellant had filed a number of complaints in federal courts seeking protection and relief from **injuries suffered**. Each and every case and appeal that had been filed had been met with **a variety of due process violations by said courts.** E.g.: 748 pages of very relevant and properly authenticated evidence was improperly dispelled with a knowingly false representation; discovery of relevant evidence was denied; undisputed facts were ignored; requirements of applicable law were canceled; and more. All Appellant was seeking was fairness and justice which were denied to him from the operation of 28 U.S.C. § 1254 and 28 U.S.C. § 2284. The constitutionality of said laws was challenged in the current district court case [06-198 JB].
>
> **2. Statement of the Facts Relevant to the Issues Presented for Review.**
>
> A very pertinent fact to all Issues is that Appellees have not and can not controvert the requirement of law concerning the equal protection component of the Fifth Amendment that has been denied to Petitioner.
>
> a. First Issue: Appellant had presented evidence of his injury as a direct result of the operation of 28 U.S.C. § 1254; and that his injuries would likely remain

unresolved because **the district court would refuse to convene a three-judge court** due to the operation of 28 U.S.C. § 2284. See doc 1 at 5 thru 7.

b. Second Issue: **the district court fabricated completely different injuries than those that Appellant detailed within his Complaint** [06-198 JB]. Compare doc 15 at 6 with doc 1 at 5, 6. This was done by the district court to improperly eliminate Petitioner's standing.

c. Third Issue: this instant Complaint demands no damages, and seeks injunctive relief only. **The district court has inappropriately applied the Sovereign Immunity Doctrine that applies only to damage suits.** See doc 13 at 6. An essential point of law, concerning the lack of immunity available when only injunctive relief is sought, was not addressed by the district court. Petitioner had supported said lack of immunity claim with the citation of four(4) Supreme Court cases along with cases from six (6) different circuit courts. See doc 1 at 2.

d. Fourth Issue: this instant Complaint is towards Respondents in their official capacities only. **The district court misapplied the Speech or Debate Clause immunity which applies towards legislators in their "personal" capacities**. The Speech or Debate Clause does not preclude judicial review of enacted legislation to determine said legislation's constitutionality. See doc 13 at 9, 10."

The 10th Cir. erroneously applied the doctrine of Sovereign Immunity towards this case by referring to *Wyoming v. United States*, 279 F.3d 1214, 1225 (10h Cir. 2002). A-5, 6 The 10th Cir. claimed that:

> " . . .Mr. Rockefeller is attempting to invoke the "[t]wo narrow exceptions to the general bar against suits seeking [injunctive] relief from the United States, *Wyoming*, 279 F.3d at 1225, his attempt must fail." See A-8.

The *Wyoming* case cites to a 1949 ruling of this Court [*Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687-88 (1949)] as a source for the bar against injunctive relief "absent a congressional waiver of immunity." See *Id.* This claim of the 10th Cir. towards this case must fail for two reasons.

First, if the Legislative Branch was immune towards an injured party's challenge to the constitutionality of the relative legislation, there are a number of cases that would have been dismissed on those grounds that were not (emphasis added). See *Clinton v. City of New York*, 524 U.S. 417 (1998); *Gravel v. United States*, 408 U.S. 606, 618 (1972); *Newdow v. U.S. Congress*, No. 00-16423, Sec. II (9th Cir. Feb. 28th, 2003); *Powell v. McCormack*, 395 U.S. 486, 503-06 (1961). Secondly, Petitioner had cited to *Pulliam v. Allen*, 466 U.S. 552, 528, 537, 541 (1984); three other opinions of this Court affirming *Pulliam*; and rulings of six different circuit courts that all ruled that the United States government as a whole has no immunity when only injunctive relief is demanded. See doc. 1 at 2.

Both the district court and the 10th Cir. have failed to respond to this essential point of law emphasized by Petitioner. Rather, both lower courts have committed "all manner of errors, including departing from the rules of natural justice, . . . , misconstruing substantive law, and rejecting legal evidence." See *Pulliam*, 466 U.S. at 533. Both lower courts have very clearly displayed egregious bias and ill-will against Petitioner.

Question 2

The 10th Cir. has erroneously claimed that:

> ". . . we have determined only that **Mr. Rockefeller is foreclosed from obtaining judicial review of the subject legislation by means of a lawsuit filed directly against the United States Congress** . . ."

See A-8. The 10th Cir. makes a bare claim that Petitioner is "foreclosed from obtaining judicial review." See *Id* There is absolutely no support at law offered to justify said claim. To the contrary, Petitioner had offered the following response to a similar bare claim of Respondents:

> "Appellees also make the bogus claim that they are "not proper defendants." Response at 21 n.5. The 9th Cir. and Sup.Ct. have held that those enacting legislation or vetoing sections of legislation are proper defendants respectively. See *Newdow v. U.S. Congress*, No. 00-16423 (9th Cir. Feb. 28, 2003); *Clinton v. City of New York*, 524 U.S. 417, 429 (1998); See also *Gravel v.United States*, 408 U.S. 606, 618 (1972)."

See Petitioner's 10th Cir. Reply Brief at 5. This Court can not avoid its "constitutional responsibility" or Article VI obligation, to ensure that judicial review is conducted towards legislation that is alleged to "infringe on fundamental rights." See *Powell*, 395 U.S. at 549; see also *Gravel* 408 U.S. at 620.

In a suit by the City of New York towards **Senator Clinton (the proper party defendant)** this Court ruled that:

> "We are also unpersuaded by the Government's argument that **appellee's challenge to the constitutionality of the Act** is nonjusticiable."

See *Clinton*, 524 U.S. at 429; see also *Newdow*, No. 00-16423 at Sec. II. This Court has ruled that it is "the traditional role accorded courts to interpret the law" and that:

> "Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility." [citations omitted]

See *Powell*, 395 U.S. at 548-49. Both lower courts have refused to comply, in this case, with their "constitutional responsibility." See *Id.*

Prayer for Relief

Petitioner prays that this Court grant this instant Petition to support the Constitution when such is so drastically needed. In addition, the current requirements for convening of a three-judge district court need to be clarified when "the literal words of the statutory apparatus bear little or no relation to . . . policy" or are vague. See *Gonzales*, 419 U.S. at 97-98.

Respectfully submitted,

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APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TOD N. ROCKEFELLER, Plaintiff-Appellant	No. 06-2332
v.	(D.C. No. CV-06-0198-JB/RLP)
JEFF BINGAMAN, in his official capacity as U.S. Senator, et al., Defendants-Appellees.	(D. N.M.) Filed On: JULY 16, 2007

ORDER

Before McCONNELL, PORFILIO, and BALDOCK, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court
requested that the court be polled, that petition is also denied.

ELISABETH A. SHUMAKER
CLERK, U.S. COURT OF APPEALS

APPENDIX 2

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TOD N. ROCKEFELLER, Plaintiff-Appellant v. JEFF BINGAMAN, in his official capacity as U.S. Senator; THE U.S. SENATE; STEVE PEARCE in his official capacity as U.S. Representative; and THE U.S. HOUSE OF REPRESENTATIVES, Defendants-Appellees.	No. 06-2332 (D.C. No. CV-06-0198-JB/RLP) (D. N.M.) Filed On: MAY 17, 2007

ORDER AND JUDGMENT *

Before McCONNELL, PORFILIO, and BALDOCK, Circuit Judges.

In the pro se complaint that he filed in the district court, Tod N. Rockefeller asserted claims against two members of the United States Congress acting in their official capacities, the United States House of Representatives, and the United States Senate, alleging that he "has suffered injury from Defendants due to their enactment of laws which have deprived him of his civil and Constitutional

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed.R.App.P.34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed.R.App.P.32.1 and 10th Cir. R. 32.1.

rights." R., Doc. 1 at 2. Mr. Rockefeller further alleged that: (1) "Defendants were served with a 'Demand for the Introduction of a Bill Restoring the Right of Direct Appeal to the Supreme Court for Constitutional Violations' " *id* at 3; and (2) "Defendants had the authority to prevent and/or remedy the injuries inflicted upon Plaintiff, but refused to do so," *id* at 2-3. Defendants filed a motion to dismiss Mr. Rockefeller's complaint under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. The district court granted the motion, concluding that "Defendants are protected by sovereign immunity, the Plaintiff is without standing to bring his claims, and the Plaintiff's claims are barred by the Speech and Debate Clause." R., Doc. 15 at 1. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

In its thorough and well-reasoned order, the district court summarized the background of this case and Mr. Rockefeller's claims as follows:

> Plaintiff Tod N. Rockefeller, proceeding pro se, alleges that he is a former environmental scientist in the Carlsbad Area Office of the United States Department of Energy who was terminated from his position. See Complaint, Caption, Prayer, at 1, 11, filed March 15, 2006 (Doc. 1). Following his termination, Rockefeller challenged his dismissal administratively and in the courts, bringing suit against various federal defendants. See id. ¶¶ 16-23, at 5-6. In three prior lawsuits, federal district courts ruled against Rockefeller. See id. The Court of Appeals affirmed each of those district court decisions, and the Supreme Court denied certiorari. See id.

> In this action, Rockefeller asserts that 28 U.S.C. § 1254, which eliminated direct appeal to the Supreme Court from adverse courts of appeals decisions, and 28 U.S.C. § 2284, which limited grounds for convening a three-judge district court panel, are unconstitutional *See id.* ¶¶ 24-42, at 6-10. Rockefeller maintains that these laws violate the Constitution's separation-of-powers doctrine and Article III. *See id.* Rockefeller further alleges that he notified the Defendants of the unconstitutionality of §§ 1254 and 2284, and that the Defendants did not take an action to remedy the two laws. *See id.* ¶¶ 8-10, at 3. Rockefeller contends that the operation of these laws and the Defendants' failure to address them have injured him. *See id.* ¶ 43, at10 As such, Rockefeller demands that a three-judge panel decide his suit for an injunction halting the operation of § 1254. *See id.* ¶¶ 42, 44, at 10.

R., Doc. 15 at 1-2.

"We review a district court's dismissal for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) de novo." *Tsosie v. United States*, 452 F.3d 1161, 1163 (10th Cir. 2006). Having conducted the required de novo review, we agree with the district court that it lacked subject matter jurisdiction because "Defendants are protected by sovereign immunity, . . . and the Plaintiff's claims are barred by the Speech and Debate Clause." R., Doc.15 at 1. We therefore do not need to address the district court's alternative jurisdictional ruling that Mr. Rockefeller lacked standing to bring his claims. See *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999) ("While [*Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1988)]

reasoned that subject-matter jurisdiction necessarily precedes a ruling on the merits, the same principle does not dictate a sequencing of jurisdictional issues.").

"It is elementary that the United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quotation omitted). "The United States consents to be sued only when Congress unequivocally expresses in statutory text its intention to waive the United States' sovereign immunity." *United States v. Richman (In re Talbot)*, 124 F.3d 1201, 1206 (10th Cir. 1997). Moreover, "the existence of consent is a prerequisite for [subject matter] jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212 (1983).

"In general, federal agencies and officers acting in their official capacities are also shielded by sovereign immunity." *Merida Delgado v. Gonzales*, 428 F.3d 916, 919 (10th Cir. 2005). "Federal courts generally deem a suit for specific relief, e.g., injunctive or declaratory relief, against a named officer of the United States to be a suit against the sovereign." *Wyoming v. United States*, 279 F.3d 1214, 1225 (10th Cir. 2002). Thus, it is well established that the United States' sovereign immunity "extends to [claims for] injunctive relief." *United States v. Murdock Mach. And Eng'g Co. of Utah* 81 F.3d 922, 929 (10th Cir. 1996). The Supreme Court has recognized, however, that "t[t]wo narrow exceptions to the general bar against suits seeking specific relief from the United States exist." *Wyoming*, 279 F.3d at 1225. As we have explained:

> A court may regard a government officer's conduct as so "illegal" as to permit a suit for specific relief against the officer as an

> an individual if (1) the conduct is not within the officer's statutory powers or, (2) those powers, or their exercise in the particular case, are unconstitutional.

Id. (Citing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 702 (1949)).

We agree with the district court that "[s]overeign immunity forecloses Rockefeller's claims against the House of Representatives and Senate as institutions, and Representative Pearce and Senator Bingaman as individuals acting in their official capacities." R. Doc. 15 at 5 (citing *Keener v. Cong. of the U.S.*, 467 F.2d 952, 953 (5th Cir. (1972), As the district court pointed out, "[b]ecause an 'official capacity' suit is treated as a suit against a government entity, see Kentucky v. Graham, 473 U.S. 159, 166 (1985), Representative Pearce and Senator Bingaman, acting in their official capacities, enjoy the envelope of the Congress' sovereign immunity, see Travelers Ins. Co. v. SCM Corp., 600 F.Supp. 493, 497 (D.D.C. 1984." R. Doc. 15 at 5.

We also agree with the district court that the Speech or Debate Clause of the United States Constitution, U.S. Const. Art. I, § 6, cl. 1,[1] "protects the acts with which Rockefeller takes issue in this case - Congress' enactment of certain legislation and the decision of individual Congressmen not to take legislative action in response to Rockefeller's prompts." R., Doc. 15 at 7; see also *Doe v. McMillan* , 412 U.S. 306, 311-13 (1973) (stating that the Speech or Debate Clause "protects Members [of Congress] against prosecutions that directly impinge upon or threaten the legislative process," and

---

1 The Speech or Debate Clause states that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S.Const. Art.I, § 6, cl.1

that "Congressmen and their aides are immune from liability for their actions within the legislative sphere, even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional") (quotations and citations omitted). As a result, the district court correctly determined that it did not have subject matter jurisdiction over the claims asserted against Senator Bingaman and Representative Pearce. See *Fields v. Office of Eddie Bernice Johnson, Employing Office, U.S. Cong.*, 459 F.3d 1, 13 (D.C. Cir. 2006) ("The Speech or Debate Clause operates as a jurisdictional bar when the actions upon which a plaintiff sought to predicate liability were the legislative cts.") (quotations omitted).

In light of the above rulings, we reject Mr. Rockefeller's arguments to the effect that: (1) "the United States has no immunity when only injunctive relief is sought," Aplt. Opening Br. At 7; and (2) "[t]he Speech or Debate Clause does not preclude judicial review of enacted legislation to determine said legislation's constitutionality," id. At 3. First, although "the 1976 amendments to § 702 of the Administrative Procedure Act, 5 U.S.C. § 702, eliminated the [United States'] sovereign immunity defense in virtually all actions for non-monitory relief against a U.S. agency or officer [thereof] acting in an official capacity." *Clark v. Library of Cong.*, 750 F.2d 89, 102 (D.C. Cir. 1984), "the [United States] Congress is not an 'agency' as defined under the Administrative Procedure Act." *Id* (citing 5 U.S.C. § 701(b)(1)(A) (excluding Congress from the definition of agency)); see also *Trudeau v. Federal Trade Comm'n*, 456 F.3d 178, 187 (D.C. Cir. 2006) (stating that § 702 "refer[s] to a claim against an 'agency' and hence waives immunity only when the defendant falls within that category") Consequently, the waiver of sovereign immunity

contained in § 702 does not apply to this case.

Second, to the extent Mr. Rockefeller is attempting to invoke the "[t]wo narrow exceptions to the general bar against suits seeking [injunctive] relief from the United States, *Wyoming*, 279 F.3d at 1225, his attempt must fail. In the context of a suit for injunctive relief against individual members of Congress, the exceptions for ultra vires and unconstitutional conduct would in effect nullify the legislative immunity provided to members of Congress by the Speech or Debate Clause. We thus conclude that the exceptions are not available here.

Finally, our holding in this case does not mean that "[t]he Speech or Debate Clause . . . preclude[s] judicial review of enacted legislation to determine said legislation's constitutionality." Aplt Opening Br. At 3. To the contrary, we have determined only that Mr. Rockefeller is foreclosed from obtaining judicial review of the subject legislation by means of a lawsuit filed directly against the United States Congress and individual members thereof in their official capacities.

The judgment of the district court is AFFIRMED.

Entered for the Court

Michael W. McConnell
Circuit Judge

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TOD N. ROCKEFELLER,
Plaintiff,

v.

JEFF BINGAMAN, in his official capacity as U.S. Senator; THE U.S. SENATE; STEVE PEARCE in his official capacity as U.S. Representative; and THE U.S. HOUSE OF REPRESENTATIVES,
Defendants.

No. CIV-06-0198 JB/RLP

Doc. 16

Filed On: SEPT 20, 2006

FINAL JUDGMENT

THIS MATTER came before the Court on the Motion to Dismiss by Defendants Steve Pearce and the House of Representatives, filed August 17, 2006 (Doc. 6), and the Motion to Dismiss by Defendants Senator Jeff Bingaman and the United States Senate, filed August 29, 2006 (Doc. 9). The Court, having granted the motions, finds that Final Judgment should and will be entered against the Plaintiff and in favor of the Defendants. The Final Judgment adjudicates all existing claims and liabilities of the parties.

IT IS ORDERED that Final Judgment is entered in favor of the Defendants and against the Plaintiff on all claims. The Court dismisses all claims against all Defendants. The Complaint is dismissed.

s/James O. Browning
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TOD N. ROCKEFELLER,
Plaintiff,

v.

JEFF BINGAMAN, in his official capacity as U.S. Senator; THE U.S. SENATE; STEVE PEARCE in his official capacity as U.S. Representative; and THE U.S. HOUSE OF REPRESENTATIVES,
Defendants.

No. CIV-06-0198 JB/RLP

Doc. 15

Filed On: SEPT 20, 2006

MEMORANDUM OPINION AND ORDER

THIS MATTER came before the Court on the Motion to Dismiss by Defendants Steve Pearce and the House of Representatives, filed August 17, 2006 (Doc. 6), and the Motion to Dismiss by Defendants Senator Jeff Bingaman and the United States Senate, filed August 29, 2006 (Doc. 9). The primary issue is whether the Court should dismiss the action for lack of jurisdiction and failure to state a claim. Because the Court believes that the Defendants are protected by sovereign immunity, the Plaintiff is without standing to bring his claims, and the Plaintiff's claims are barred by the Speech and Debate Clause, the Court finds that it does not have subject-matter jurisdiction over the case and will grant the Defendants' motions to dismiss.

FACTUAL BACKGROUND

Plaintiff Tod N. Rockefeller, proceeding pro se, alleges that he is a former environmental scientist in the Carlsbad Area Office of the United States Department of Energy who was terminated from his

position. See Complaint, Caption, Prayer, at 1, 11, filed March 15, 2006 (Doc. 1). Following his termination, Rockefeller challenged his dismissal administratively and in the courts, bringing suit against various federal defendants. See id. ¶¶ 16-23, at 5-6. In three prior lawsuits, federal district courts ruled against Rockefeller. See id. The Court of Appeals affirmed each of those district court decisions, and the Supreme Court denied certiorari. See id.

In this action, Rockefeller asserts that 28 U.S.C. § 1254, which eliminated direct appeal to the Supreme Court from adverse courts of appeals decisions, and 28 U.S.C. § 2284, which limited grounds for convening a three-judge district court panel, are unconstitutional *See id.* ¶¶ 24-42, at 6-10. Rockefeller maintains that these laws violate the Constitution's separation-of-powers doctrine and Article III. *See id.* Rockefeller further alleges that he notified the Defendants of the unconstitutionality of §§ 1254 and 2284, and that the Defendants did not take an action to remedy the two laws. *See id.* ¶¶ 8-10, at 3. Rockefeller contends that the operation of these laws and the Defendants' failure to address them have injured him. *See id.* ¶ 43, at10 As such, Rockefeller demands that a three-judge panel decide his suit for an injunction halting the operation of § 1254. *See id.* ¶¶ 42, 44, at 10.

PROCEDURAL BACKGROUND

The Defendants seek to have the Court dismiss all claims against them in this action, with prejudice, pursuant to rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure. See Motion to Dismiss of Defendants Steve Pearce and the United States House of Representatives, at 1; Motion to Dismiss by Defendants Senator Jeff Bingaman and the United States Senate, at 1. The Defendants

contacted Rockefeller to request his consent to their moves to dismiss; Rockefeller declined to grant his concurrence. See Motion to Dismiss of Defendants Steve Pearce and the United States House of Representatives, at 1; Motion to Dismiss by Defendants Senator Jeff Bingaman and the United States Senate, at 2.

LAW REGARDING JURIDICTION & DISMISSAL

"Federal courts are courts of limited jurisdiction; they are empowered to hear only those cases authorized and defined in the Constitution which have been entrusted to them under a jurisdictional grant by Congress." Henry v. Office of Thrift Supervision, 43 F.3d 507, 511 (10th Cir. 1994). Rule 12(b)(1) empowers a court to dismiss a complaint for "lack of jurisdiction over the subject matter." Fed. R. Civ. Proc. 12(b)(1). "The burden of establishing subject-matter jurisdiction is on the party asserting jurisdiction." Montoyo v. Chao, 296 F.3d 952, 955 (10th Cir. 2002)(citing Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994)).

Whenever it appears that the court lacks jurisdiction of the subject matter involved in an action, the court must dismiss the action. See Tusk v. United Servs. Auto Ass'n, 859 F.2d 842, 844 (10th Cir. 1988). "The party seeking the exercise of jurisdiction in his favor must allege in his pleading the facts essential to show jurisdiction." United States ex rel. Gen. Rock & Sand Corp. v. Chuska Dev. Corp., 55 F.3d 1491 1495 (10th Cir. 1995). In determining whether a party has adequately presented facts sufficient **to establish jurisdiction, the court should look to the com- plaint's face**, see Whitelock v. Leatherman, 460 F.2d 507, 514 (1oth Cir. 1972), **accepting the well pleaded factual allegations as true**, see United States v. Rodriguez Aguirre, 264 F.3d 1195, 1203

(10th Cir. 2001), but ignoring conclusory allegations of jurisdiction, see Groundhog v. Keeler, 442 F.2d 674, 677 (10th Cir. 1971).

A motion to dismiss pursuant to rule 12(b)(6) "'admits all well-pleaded facts in the complaint as distinguished from conclusory allegations."' Tal v. Hogan, No. 03-6293, 2006 U.S. App. LEXIS 16437, at 11 (10th Cir. June 29, 2006)(quoting Mitchell v. King, 537 F.2d 385, 386 (10th Cir. 1976)). The court's role "'on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." Id. At 11-12 (citing Sutton v. Utah State Sch. for the Deaf & Blind, 173 F.3d 1226, 1236 (10th Cir. 1999)). **The court "must liberally construe the allegations of a pro se complaint."** Perkins v. Kan. Dep' t of Corrs., 165 F.3d 803, 806 (10th Cir. 1999)(citing Haines v. Kerner, 404 U.S. 519, 520-21 (1972)).

"A 12(b)(6) motion should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Sutton v. Utah State Sch. for the Deaf & Blind, 173 F.3d at 1236. The court is "not bound by conclusory allegations, unwarranted inferences, or legal conclusions." Hackford v. Babbit, 14 F.3d 1457, 1465 (10th Cir. 1994). "Dismissal of a pro se complaint for failure to state a claim is proper only where it is obvious that the plaintiff cannot prevail on the facts he has alleged and it would be futile to give him an opportunity to amend." Perkins v. Kan. Dep' t of Corrs., 165 F.3d at 806 (citing Whitney v. New Mexico, 113 F.3d 1170, 1173 (10th Cir. 1997))).

ANALYSIS

While the Defendants ask the Court to, among other things, dismiss Rockefeller's claims on the merits with prejudice, the Court need not and should not go that far in its analysis. The Court does not have jurisdiction over this matter, for three reasons. First, sovereign immunity bars Rockefeller's claims. Second, Rockefeller does not have standing to bring his claims. And third, the Speech or Debate Clause bars Rockefeller's claims.

I. SOVEREIGN IMMUNITY BARS ROCKEFELLER'S CLAIMS.

Sovereign immunity forecloses Rockefeller's claims against the House of Representatives and Senate as institutions, and Representative Pearce and Senator Bingaman as individuals acting in their official capacities. See Keener v. Cong. of the U.S., 467 F.2d 952, 953 (5th Cir. (1972)(affirming dismissal because Congress "is protected from suit by sovereign immunity"). Because an "official capacity" suit is treated as a suit against a government entity, see Kentucky v. Graham, 473 U.S. 159, 166 (1985), Representative Pearce and Senator Bingaman, acting in their official capacities, enjoy the envelope of the Congress' sovereign immunity, see Travelers Ins. Co. v. SCM Corp., 600 F.Supp. 493, 497 (D.D.C. 1984)(holding that "[i]t is clear that a claim against a federal employee in his or her 'official capacity' is in effect a claim against the government. The sovereign immunity doctrine cannot be evaded by changing the label on the claims or the parties."). Accordingly, sovereign immunity prevents the Court from establishing subject-matter jurisdiction in this case and bars Rockefeller from bringing his claims. See United States v. Mitchell, 463 U.S. 206, 212 (1983) (asserting that "[i]t is axiomatic that the United States may not be sued without its consent and

that the existence of consent is a prerequisite for [subject-matter] jurisdiction."); Rozenblat v. Sandia Corp., 206 WL678923, at 1, 4 (Fed. Cir. 2006) (affirming a district court's dismissal on the grounds that the plaintiff's failure to show that Congress had waived sovereign immunity barred the suit for lack of subject-matter jurisdiction); United States v. Murdock Mach. & Eng'g Co. of Utah, 81 F.3d 922, 930 (10th Cir. 1996)(holding that "if the government has not consented to suit, the courts have no [subject-matter] jurisdiction to either 'restrain the government from acting, or to compel it to act'").

II. ROCKEFELLER DOES NOT HAVE STANDING TO BRING HIS CLAIMS.

Article III of the Constitution limits the jurisdiction of the federal courts to the resolution of actual cases and controversies. See U.S. CONST. Art III, § 2. Actual cases and controversies require the plaintiff to have standing. The plaintiff bears the burden of establishing his standing to bring suit. See Wyo. Sawmills, Inc. v. U.S. Forest Serv., 383 F.3d 1241, 1246 (10th Cir. 2004). To meet that burden, a plaintiff must demonstrate: that they have suffered an injury in fact - an invasion of a legally protected interest that is concrete and particularized, and actual or imminent; that the injury was caused by or traceable to the challenged action of the defendant; and that it is likely that a favorable decision will redress the injury. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992); Nova Health Sys. v. Gandy, 416 F.3d 1149, 1154 (10th Cir. 2005).

Rockefeller fails to allege concrete and particularized harm to a legally protected interest that flows from his lack of ability to appeal directly to the Supreme Court or establish a three-judge panel to adjudge his claims. Rather, Rockefeller main-

tains, only in a general sense, that he has suffered injury from §§ 1254 and 2284. Comp. ¶ 7 at3. Moreover, the concrete and particularized harms that Rockefeller articulates relate to the termination of his employment and not to the operation of the two statutes with which he takes issue. See id. ¶ 43, at 10. Rockefeller also fails to demonstrate a likelihood that the relief he seeks will redress the harms he identifies. Even if this Court grants the injunction that Rockefeller requests, that outcome would not remedy Rockefeller's dismissal from employment nor permit him to reopen his prior cases to seek further Supreme Court review. Rockefeller does not have standing to pursue this action because he has not alleged a concrete and particularized harm and has not shown that redress is likely given a determination in his favor; therefore, the Court does not have the requisite subject-matter jurisdiction to hear this case.

III. THE SPEECH AND DEBATE CLAUSE BARS ROCKEFELLER'S CLAIMS.

"[F]or any Speech or Debate in either House [Senators and Representatives] shall not be questioned in any other place." U.S. CONST., Art. I, § 6, cl. 1. The Supreme Court has consistently held that this clause provides immunity from suit for "anything 'generally done in a session of the House by one of its members in relation to the business before it'" Doe v. McMillan, 412 U.S. 306, 311 (1973). See Bastien v. Office of Sen. Ben Nighthorse Campell, 390 F.3d 1301, 1314 (10th Cir. 2004)(stating that "in light of the history and undoubted purpose of the Clause, the words 'Speech or Debate' have been read broadly to encompass all formal actions in the official business of Congress, including voting, conducting hearings, issuing reports, and issuing subpoenas."). Such immunity covers suits for injunctions or damages. See

Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 501 (1975).

The Speech and Debate Clause protects the acts with which Rockefeller takes issue in his case - Congress' enactment of certain legislation and the decision of individual Congressmen not to take legislative action in response to Rockefeller's prompts. Accordingly, the Speech and Debate Clause keeps the Court from attaining subject-matter jurisdiction and prohibits Rockefeller from bringing his current clams. See Doe v. McMillan, 412 U.S. at 318; Gravel v. United States, 408 U.S. 606, 618 (1972); Fields v. Office of Eddie Bernice Johnson, No. 04-5315, 2006 U.S. App. LEXIS 21140, 31 (D.C. Cir. Aug. 18, 2006) (maintaining that the "Speech and Debate Clause operates as a jurisdictional bar when 'the actions upon which [a plaintiff] sought to predicate liability were legislative acts.'").

Pursuant to Rule 12(b)(6), and basd on the foregoing analysis of sovereign immunity, standing, and the Speech and Debate Clause, Rockefeller's complaint is subject to dismissal for lack of subject-matter jurisdiction.

IT IS ORDERED that the Defendants' motions to dismiss are granted. The Court will dismiss the Plaintiff's action.

s/James O. Browning
UNITED STATES DISTRICT JUDGE

APPENDIX 4

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TOD N. ROCKEFELLER, former ENVIRONMENTAL SCIENTIST, CARLSBAD AREA OFFICE, UNITED STATES (U.S.), DEPT. OF ENERGY (DOE), Plaintiff,	}	**DOC. 13** CV-06-0198 JB/CEG
vs.	}	
SENATOR JEFF BINGAMAN, in his official capacity as U.S. SENATOR, NM; the U.S. SENATE; STEVE PEARCE in his official capacity as U.S. REPRESENTATIVE, NM; and the U.S. HOUSE OF REPRESENTATIVES, Defendants.	}	

RESPONSE TO MOTION TO DISMISS BY DEFENDANTS SENATOR JEFF BINGAMAN AND THE UNITED STATES SENATE

I. Introduction

This captioned Complaint is a simple and straightforward constitutional challenge to alleged unconstitutional laws [Pub.L. 100-352 amending 28 U.S.C. § 1254, and Pub.L. 94-381 amending 28 U.S.C. § 2284] enacted by the Legislative Branch. It has been clearly demonstrated by Plaintiff, within his Complaint at 5, 6, that he has suffered, and would continue to suffer, direct injury as a result of said laws contrary to what the Senate Defendants are claiming within their Memorandum in Support of the Senate Defendants' Motion to Dismiss (henceforth "Memo").

As the captioning of this Complaint indicates

, Plaintiff is not suing his local congressmen in their personal capacities, but has placed the Legislative Branch to answer for the alleged unconstitutional laws that were enacted. The evidence of direct injury to Plaintiff clearly depicts that said laws have rendered the Constitution of the U.S. unenforceable in regard to the prior cases of Plaintiff. Compl. at 5, 6. The lower courts concerned with Plaintiff, have each exceeded their authority in the violations of due process outlined. See *Id.* As one of our founding fathers, James Madison, had expressed a danger to democracy by stating that:

> "It will not be denied that power is of an encroaching nature, and that it ought to be effectively restrained from passing the limits assigned to it."

See *United States v. Johnson*, 383 U.S. 169, 178 (1966). Said Memo of the Senate Defendants attempts to apply various inapposite immunities towards this Complaint in an effort to mislead this Court. Plaintiff will very clearly demonstrate this *infra.*

II. Injures in Fact Suffered by Plaintiff

The following Petitions for Writ of Certiorari ("Petition") to the Supreme Court of the U.S. ("Sup.Ct.") outline various due process violations towards Plaintiff.

A. Petition 01-1143: outlined that the New Mexico District Court ("USDC-NM") "had improperly dispelled 748 pages of very relevant and properly authenticated evidence [that Plaintiff had filed] with a knowingly false representation." Compl. at 5.

B. Petition 02-1621: outlined that the USDC-NM had "suppressed very relevant and properly authenticated evidence" by making an obviously bogus claim that the judicial notice that

Plaintiff had given for said evidence was somehow **"premature"**. Said Court had also dismissed the complaint [01-0399 JP/LCS] while "relevant" evidence ruled by Magistrate Smith was withheld from Plaintiff. See *Id.*

C. Petition 05-290 [Compl. Encl. II]: outlines the following due process violations:

1. The fact that 42 U.S.C. § 6971(e) had been undisputedly violated was ignored. Compl. Encl. II at 1, 3, 4.

2. Documented evidence, filed with the complaint [03-1240], clearly demonstrating that Plaintiff had exceeded the requirements for Federal Tort Claims Act ("FTCA") Notice was ignored. See *Id* at 2, 3.

3. The lower courts had both ignored a valid constitutional claim of Plaintiff. E.g.: "a very distinct violation of the equal protection component of the Fifth Amendment . . . ." [employee protection provision of 42 U.S.C. § 6971(e)] See *Id* at 4, 5.

4. A valid 42 U.S.C. § 1983 claim was ignored. See *Id* at 5, 6.

5. The Motion to Dismiss Petitioner's complaint was very clearly demonstrated to have been untimely. This contention was supported by evidence that had been filed by the defendant. The district court dismissed the complaint, despite this undisputable evidence, with a knowingly false representation. The DC Cir. did not address this essential point of law despite the fact that said issue had been raised by Plaintiff [Appellant] several times within that court. This certainly is an egregious violation of Plaintiff's due process rights. See *Id* at 6

III. Argument

Within the Memo, the Senate Defendants present four (4) claims to support their alleged justifications for the dismissal of this captioned

Complaint. Plaintiff will fully address each of these claims of the Senate Defendants *infra*, demonstrating each to be unsound.

A. "Plaintiff's Claims Against the Senate Defendants are Barred by Sovereign Immunity."

1. ". . . , as Plaintiff can point to no waiver of sovereign immunity to bring his claims against either the Senate as a whole or Senator Bingaman in particular, his claims against them should be dismissed." Memo at 6.

Contrary to the claim of the Senate Defendants, Sovereign Immunity does NOT have to be overcome to challenge the constitutionality of any laws, as long as standing to make such a challenge is demonstrated. **To place Sovereign Immunity as a hurdle to overcome to challenge the constitutionality of a law would certainly violate the Separation of Powers Doctrine.** It is axiomatic that each of the three branches of the government of the U.S. must have an unfettered ability [no immunities to overcome] to check the power and activities of the other two branches. This is common sense and obvious. In support of this contention, the Supreme Court ("Sup.Ct.") has ruled that:

> "Especially is it competent and proper for this court to consider whether its [the legislature's] proceedings are in conformity with the Constitution and laws because, living under a written constitution, no branch or department of the government is supreme, and **it is the province and duty of the judicial department to determine, in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the**

> **enactment of laws**, **have been exercised in conformity to the Constitution**, and, if they have not, to treat their acts as null and void. *Kilbourne v. Thompson*, 103 U.S. 168, 199 (1881)." (quoting *Powell v. McCormack*, 395 U.S. 486, 506 (1969)).

A landmark Sup.Ct. case that outlined the role of the Judicial Branch in determining the constitutionality of legislative enactments was *Marbury v. Madison*, 5 U.S. 137 (1803). In *Marbury*, the Sup.Ct. ruled that:

> "Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently . . . **an act of the Legislature repugnant to the Constitution is void."** *Id* at 177
>
> **"It is emphatically the province and duty of the Judicial Department to say what the law is."** *Id* at 177.

In many "**cases regularly brought before them**" the Judicial Branch reviews the constitutionality of laws without noting that immunities have to be overcome by a plaintiff to do so. See *Powell*, 395 U.S. at 506. There are further rulings of the Sup.Ct. that reflect this point:

> ". . . , it is axiomatic that the judicial department of the government is charged with the solemn duty of enforcing the Constitution, and therefore, in cases properly presented, of determining whether a given manifestation of authority has exceeded the power conferred by that instrument."

See *McCray v. United States*, 195 U.S. 27, 53-54 (1904). In addition, that:

> "Our system of government requires the federal courts on occasion interpret the Constitution in a manner at variance with the construction given the documentby another branch. The alleged conflict . . . cannot justify the courts' avoiding their constitutional responsibility. See *United States v. Brown*, 381 U.S. 437, 462 (1965); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 613-614 (1952)(Frankfurter, J., concurring); Myers v. United States, 272 U.S. 252, 293 (1923) (Brandeis, J., dissenting)."

See *Powell*, 395 U.S. at 549. In addition that:

> "*Powell v. McCormack* reasserted judicial power to determine the validity of legislative actions impinging on individual rights - - . . . ."

See *Gravel v. United States*, 408 U.S. 606, 620 (1972). Plaintiff has "properly presented" his case to this Court for "determining whether a given manifestation of authority [the Public Laws noted *supra*] has exceeded the power conferred by" the Constitution. 195 U.S. at 53-54. The 9th Circuit has also ruled that:

> **"It is the highest calling of federal judges to invoke the Constitution to repudiate unlawful majoritarian actions and**, when necessary, **to strike down statutes that would infringe on fundamental rights**, whether such statutes are adopted by legislatures or by popular vote."

See *Newdow v. U.S. Congress*, No. 00-16423, Sec. II (9th Cir. Feb. 28th, 2003)(Reinhart, concurs) "It is the highest calling" of this Court, in support of its

Article VI Oath, "to invoke the Constitution to repudiate unlawful" Public Laws noted *supra* that have apparently rendered the Constitution unenforceable with regard to the prior cases of Plaintiff that "infringe on fundamental rights." *Id.*

In summary, Sovereign Immunity, or **the "immunity doctrine" of "officials of government" applies to "damage suits"**, and NOT to this instant Complaint challenging the constitutionality of legislative acts. See *Doe v. McMillan*, 412 U.S. 306, 318-19 (1973).

B. "Plaintiff Lacks Standing to Bring His Claims." Memo at 7 - 9.

The Senate Defendants are basically claiming that Plaintiff cannot satisfy any of the three required elements to establish standing. These three elements are that:

> ". . . standing, . . . requires demonstrating (1) an "injury in fact," (2) a causal connection between this injury and the conduct complained of, and (3) that this injury will be redressed by a favorable decision."

See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). .

> 1. "Plaintiff has failed to allege any harm to a legally protected interest that he has suffered . . . ." Memo at 8.

The injuries-in-fact outlined within Section II. *supra* very specifically detail severe personal injuries of due process violations. E.g.: dismissal of case 01-0399 JP/LCS while "relevant" evidence was withheld; a valid and undisputed constitutional claim that was completely ignored [Petition 05-290]; and an undisputed claim of untimeliness of the response of the defendant to Plaintiff's complaint which was completely ignored by both lower

courts [Petition 05-290]. On several occasions, Plaintiff had been robbed of a fair jury trial by the egregious violations of due process against him. **These injuries of Plaintiff are completely avoided by the Senate Defendants with the knowingly false representation directly below.**

> 2. "the only harms he alleges in his complaint are that he "has suffered lost wages, lost retirement and health benefits, professional and personal humiliation, grief, stress, and constant worry." Id. ¶ 43." Memo at 8.

With what is detailed *supra*, and within Plaintiff's actual Complaint, this statement of the Senate Defendants is a very brazen knowingly false representation, and an insult to the integrity of this Court. The Sup.Ct. has ruled that a party's "untruthfulness" results in that "credibility has been wholly discredited", and that "no other conclusion is possible." See *Mesarosh v. United States*, 352 U.S. 1, 9 (1956). The Senate Defendants must lose all credibility concerning this Complaint. Two additional bogus claims of the Senate Defendants follow directly below.

> 3. "Plaintiff appears to argue that he would have received a satisfactory outcome in his previous lawsuits had his claims been . . . allowed a guaranteed appeal to the Supreme Court. However, such an allegation is mere speculation and conjecture . . . ." Memo at 8.

The due process violations towards Plaintiff within Sec. II *supra* have not been controverted or denied, and are therefore established facts. The silence of the defendants constitutes an adoptive admission per Fed.R.Evid. 801(d)(2)(B). See *United States v. Andrus*, 775 F.2d 825, 839-40 (7th Cir.

1985). If Plaintiff attained the right of submitting his prior cases to the Sup.Ct. as direct appeals, these cases would be reviewed on their merits. There would be no room for doubt that in the Sup.Ct. written decisions, there would be remedial instructions towards the due process violations. Plaintiff's cases would be remanded back for fair jury trials. This relief is very far from being "mere speculation and conjecture" as the Senate Defendants claim. Memo at 8. Henceforth, a favorable decision from this Court would provide that Plaintiff's injuries would be redressed satisfying the third element of standing.

> 4. Appeals to the Sup.Ct. "would not remedy plaintiff's termination from his employment . . . , as those prior lawsuits have reached final judgment." Memo at 9

With Plaintiff's cases remanded back for a fair jury trial, his "termination from his employment" would certainly be remedied contrary to the claim of the Senate Defendants. *Id* In addition, appeals to the Sup.Ct. of Plaintiff's prior cases that were improperly dismissed with no trials, are NOT "an impermissible collateral attack on the final judgments rendered in those cases" as the Senate Defendants claim. See Memo at 9 n.4. As Plaintiff had explained within his Complaint:

> "45. **The change in application of 28 U.S.C. § 1254 would have a retroactive effect** towards Plaintiff's Petitions because said effect "[w]ould . . . increase a party's [Respondents'] liability for past conduct, or impose new duties [direct appeal] with respect to transactions already completed." See *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994).

46. **Respondents to said Petitions would not be prejudiced** by this change because "[a]pplication of a new jurisdictional rule usually "takes away no substantial right but simply changes the tribunal that is to hear the case."" *Id* at 274 (quoting *Hallowell v. Commons*, 239 U.S. 506, 508 (1916))."

See Compl. at 10, 11. Plaintiff's jury trials would not be "an impermissible attack." Memo at 9

In summary, Plaintiff has clearly satisfied all three elements of standing to challenge the Public Laws *supra*. 1) Very distinct injuries have been suffered; 2) Said injuries are linked to the Pub.L. 100-352; 3) A favorable decision would redress the injuries.

C. "Plaintiff's Suit is Barred by the Speech or Debate Clause."

1. The Senate Defendants are wrong. **Protections from the Speech or Debate Clause extend over the scope of personal immunity for congressmen and their aides**. Such Clause does not preclude judicial review of the constitutionality of enacted legislation, which is what this captioned Complaint exclusively involves. E.g.: no personal liabilities towards the congressmen for damages or otherwise are included within this Complaint [06-0198 JB/RLP]. In support of Plaintiff's position outlined *supra*, the Sup.Ct. has ruled that:

> "As our cases have consistently held, . . . , **the Speech or Debate Clause** protects legislators and their confidential aides from suit; it **does not immunize congressional action from judicial review."** (emphasis added).

See *Eastland v. United States Servicemen's Fund*,

421 U.S. 491, 513 (1975)(Marshall, J., concurring). In addition, Justice Marshall specifies that:

> "I do not read the Court to suggest, however, nor could I agree, that the constitutionality of a congressional subpoena is always shielded from more searching judicial inquiry. For, as the very cases on which the Court relies demonstrate, **the protection of the Speech or Debate Clause is personal**. It extends to Members and their counsel acting in a legislative capacity; **it does not preclude judicial review of their decisions in an appropriate case, whether they take the form of legislation or a subpoena."** *Id* at 515.

2. The Sup.Ct. has shed some light upon the design of the Speech or Debate Clause by stating that:

> "The purpose of the protection afforded legislators is not to forestall judicial review of legislative acts, but to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions."

See *Powell*,395 U.S. at 505. In conforming with this function of said Clause, the Sup.Ct. also ruled that:

> "legislators engaged "in the sphere of legitimate legislative activity," *Tenney v. Brandhove, supra*, 341 U.S. at 376, should be protected not only from the consequences of litigation's results, but also from the burden of defending themselves."

See *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967). In addition, the Sup.Ct. ruled that:

> "In *Kilbourne* [103 U.S. 168 (1881)], the Speech or Debate Clause protected House Members who had adopted a resolution authorizing Kilbourne's arrest; that act was clearly legislative in nature. But the resolution was subject to judicial review insofar as its execution impinged on a citizen's rights . . . ."

See *Gravel v. United States*, 408 U.S. 606, 618 (1972).

Plaintiff has clearly demonstrated *supra*, that the personal protections of the Speech or Debate Clause for legislators themselves, does not apply to this captioned Complaint. Said Complaint exclusively seeks "judicial review" of enacted laws that have "impinged on a citizen's rights." *Id.*

D. "Plaintiff's Allegations Fail to State a Claim." Memo at 12, 13.

1. As demonstrated *supra*, Plaintiff has most certainly clearly defined a "cognizable legal claim" contrary to the claim of the Senate Defendants. See *Id* at 12. The Senate Defendants have mistakenly come to another faulty conclusion as follows:

> "Plaintiff claims that 28 U.S.C. §§ 1254 and 2284 are unconstitutional because they do not provide him with a three-judge court to hear his constitutional claims or permit him a guaranteed appeal to the Supreme Court - in violation of the Separation of Powers doctrine and Article III. This argument fails on its face as a matter of law." Memo at 12.

The Senate Defendants are wrong. This is confirmed as the Sup.Ct. has ruled towards judicial review of legislative acts that:

> ". . . , wherever the judiciary is called upon to determine whether a power

> which Congress has exerted is within the authority conferred by the Constitution, the duty is to test the validity of the act . . . by the necessary scope and effect of the assailed document."

See *McCray*, 195 U.S. at 52. How the legislative acts were enacted or the authority of the legislature to formulate the acts in question is NOT being challenged as the Senate Defendants claim. E.g.: "See *United States v. Sanges*, 144 U.S. 310, 319 (1892)("The appellate jurisdiction of this court rests wholly on the acts of Congress.")" Memo at 12.

2. As Plaintiff had clearly outlined in his Complaint, the alleged violations of the Separation of Powers doctrine and Article III were detailed as follows:

> "26. The challenged laws, Pub.L. 94-381 [amending 28 U.S.C. § 2284] and Pub.L. 100-352 [amending 28 U.S.C. § 1254], allow members of the Judicial Branch to exceed their authority by "disregarding validly enacted and applicable statute[s] or permitting departure from it, . . . ", this violates Article III of the Constitution. See *United States v. City Lines, Inc.*, 334 U.S. 573, 589 (1948).
>
> 34. As a result, of this statutory scheme described *supra*, the people of the United States have lost control of the enforcement of their Constitution.
>
> 35. The Judicial Branch has become all-powerful by eliminating law, as described *supra*, and imposing tyranny towards whomever they please to."

See Compl. at 7, 8. The challenges of Plaintiff towards said statutes is properly with regard to the "necessary scope and effect of the assailed enactment." *McCray*, 195 U.S. at 52.

IV. Injunctive Relief

In determining that a Florida statute was unconstitutional, the Sup.Ct. concluded that persons affected by said statute "are entitled to declaratory and injunctive relief." See *Gerstein v. Pugh*, 420 U.S. 103, 126 (1975)(Stewart, J., concurring). In another decision, the Sup.Ct. pointed out that a litigant may "bring an action for declaratory judgment or injunctive relief on the ground that" a legislative act is "unconstitutional." See *Clinton v. City of New York*, 524 U.S. 417, 428 (1998); see also *Doe*, 412 U.S. at 330 (Douglas, Brennan, and Marshall, concurring). The Sup.Ct. has ruled that when injunctive relief is awarded, costs are authorized. See *Pulliam v. Allen*, 466 U.S. 522, 543-44 (1984); See also *Newdow v. U.S. Congress*, No. 00-16423, Sec. D [10] (9th Cir. Feb. 28th, 2003) Henceforth, the injunctive relief and costs that Plaintiff seeks towards this captioned Complaint is authorized and appropriate.

Conclusion

For all of the foregoing reasons, the Motion to Dismiss of Defendants Jeff Bingaman and the U.S. Senate must be denied. In addition, since a "substantial claim of unconstitutionality" is integral to this Complaint, a three-judge court must be convened to consider this claim. See *Ex Parte Poresky*, 290 U.S. 30, 31 (1933). Dated: and served September 11th, 2006

Respectfully submitted,

s/Tod N. Rockefeller, *pro se*
319 Sunnyview Street
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APPENDIX 5

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TOD N. ROCKEFELLER, former ENVIRONMENTAL SCIENTIST, CARLSBAD AREA OFFICE, UNITED STATES (U.S.), DEPT. OF ENERGY (DOE), Plaintiff,	}	**FILED Aug 9th, 2007**
vs.	}	No. 06-2332
SENATOR JEFF BINGAMAN, in his official capacity as U.S. SENATOR, NM; the U.S. SENATE; STEVE PEARCE in his official capacity as U.S. REPRESENTATIVE, NM; and the U.S. HOUSE OF REPRESENTATIVES, Defendants.	}	Dist. Ct. No 06-0198 JB/CEG

Appellant's Notice of Appeal

Notice is hereby given that Tod N. Rockefeller in the above named case hereby appeals to the Supreme Court of the United Sates, under 28 U.S.C. § 1253, from the United States Court of Appeals for the Tenth Circuit's Final Order filed in this action on the 16th day of July, 2007.

Respectfully submitted,
s/Tod N. Rockefeller, *pro se*
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(505) 200-6917

Dated: August 8th, 2007